INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Rule involved	2
Statement	2
Argument	7
Conclusion	9

CITATIONS

Cases:

Baker v. *United States*, 156 F. 2d 386, certiorari denied, 329 U.S. 763 — 8

Blumenthal v. *United States*, 332 U.S. 539 — 8

Glasser v. *United States*, 315 U.S. 60 — 8

Kaufman v. *United States*, 163 F. 2d 404, certiorari denied, 333 U.S. 857 — 8

Roddy v. *United States*, 296 F. 2d 9 — 8

United States v. *Crosby*, 294 F. 2d 928, certiorari denied, 368 U.S. 984 — 8

United States v. *Karavias*, 170 F. 2d 968 — 8

United States v. *Schwenke*, 221 F. 2d 356 — 8

United States v. *Williams*, 254 F. 2d 253 — 8

Rule:

Rule 32 (c), F. R. Crim. P. — 2, 8

726-000 64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 873

LILLIAN TENENBAUM, GERTRUDE SCHAFER, PAUL SCHAFER AND MARVIN TENENBAUM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–4) is reported at 327 F. 2d 210.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1964. A petition for rehearing was denied on January 31, 1964. The petition for a writ of certiorari was filed on February 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of a single conspiracy to use the mails to defraud insurance companies.

2. Whether the trial court abused its discretion in not directing a presentence investigation pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure.

RULE INVOLVED

Rule 32(c), F.R. Crim. P., dealing with presentence investigation, provides as follows:

> (1) *When Made.*—The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.
>
> (2) *Report.*—The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful to imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

STATEMENT

An indictment returned in the United States District Court for the Northern District of Illinois charged all petitioners with a conspiracy to use the

mails to defraud insurance companies and charged petitioners Lillian Tenenbaum, Gertrude Schafer and Paul Schafer with substantive offenses committed pursuant to the conspiracy (1 R. 2–21). All petitioners were found guilty as charged after a trial by jury. Sentences of thirty, eighteen, nine and six months' imprisonment were imposed on Lillian Tenenbaum, Gertrude Schafer, Paul Schafer and Marvin Tenenbaum, respectively (1 R. 24).[1] The court of appeals affirmed, after considering only the validity of the conspiracy convictions, which were sufficient to sustain all the concurrent sentences (Pet. App. 1–4).

1. The conspiracy count alleged that petitioners conspired together to use the mails to defraud insurance companies by making false representations on applications for income protection insurance (1 R. 18–20). Such insurance is used to replace income lost by an insured who suffers an incapacitating injury or illness which disables him from engaging in his usual occupation (1 R. 25–26, 30). It is made available by insurance companies only if the insured is regularly employed at a salary which substantially exceeds the monthly benefits provided by the policy (1 R. 31, 35, 52, 77).

In October 1955, petitioner Lillian Tenenbaum applied for such a policy, representing that she was the saleslady, buyer and part owner of a children's apparel store owned partly by her son, petitioner Marvin Tenenbaum. She reported that her weekly

[1] "1 R." refers to appellants' appendix in the court of appeals; "2 R." refers to appellee's appendix. "GX" refers to Government Exhibits, which we are filing with the Clerk of the Court.

income was approximately $150 (1 R. 43–45). The policy was issued by the Metropolitan Insurance Company on November 29, 1955 (1 R. 34). In September 1956, after several visits from an agent of Mutual of Omaha, Mrs. Tenenbaum's sister, petitioner Gertrude Schafer, obtained a similar policy in the amount of $200 per month (1 R. 54). This policy was issued on Mrs. Schafer's representation that she was also employed at the children's apparel store and was earning $300 per month (1 R. 53). Mrs. Schafer's husband, petitioner Paul Schafer, was present when the agent first met Mrs. Schafer and when her application form was being completed. He stated at the time that it was a good thing for her to take such insurance "as long as she was working" (1 R. 53). After completing her application, Mrs. Schafer informed the agent that her sister, Mrs. Tenenbaum, held a similar $400-a-month policy and arranged to have the agent visit Mrs. Tenenbaum (1 R. 54). As a result of this meeting—during which Mrs. Tenenbaum stated that she was an owner-manager of the shop and earned approximately $900 per month—Mutual of Omaha issued a $300-per-month policy to Mrs. Tenenbaum (1 R. 55–56). Thereafter, Mrs. Tenenbaum obtained three other income protection policies from various insurance companies on the basis of similar representations (1 R. 27–28, 30–31, 47, 63). Mrs. Schafer also obtained a $200-per-month policy from the John Hancock Mutual Life Insurance Co. after representing that she was employed by a jeweler and earned $700 per month (1 R. 39–40).

Mrs. Tenenbaum and Mrs. Schafer each made a number of disability or accident claims with their insurers in the years 1957 through 1961 (Pet. 13–14, GX 1, 14, 45–53, 55–63).[2] Some of these reports contained "employer's statements" regarding the absence of these petitioners which were signed by petitioner Marvin Tenenbaum (*ibid;* 1 R. 105). On various occasions, Marvin Tenenbaum represented to investigators that his mother and Mrs. Schafer were employed at the store: On October 14 or 15, 1956, he told a claims adjuster for Mutual of Omaha that his mother was a partner in the store, spending about 85% of her time waiting on the trade and the balance in buying merchandise, and that she received a salary and other remuneration (1 R. 81). On August 27, 1957, Mr. Tenenbaum told an investigator for the Chicago Transit Company who was investigating an accident that both his mother and Mrs. Schafer were employed by the store, and he gave the dates on which they had supposedly missed work by reason of the accident (1 R. 130). On October 8, 1959, an investigator for the Continental Casualty Company was told by Mr. Tenenbaum that his mother worked at the shop, but that she had just left. The following morning, he told the investigator that she was at the Merchandise Mart buying for the store, and that this was her principal duty for the firm (1 R. 78–79). On February 15, 1960, a representative of the Prudential Insurance Company was told by Mr. Tenenbaum that his mother,

[2] Government exhibits reflected that Mrs. Tenenbaum collected more than $7,000 on these insurance claims during this period (GX 2, 5, 6, 9, 11, 12, 77, 78, 91, 92, 93, 95).

who had applied for a policy with the company, spent fifty to sixty percent of her time as a buyer for the store and the remaining time as a retail clerk, earning from ten to fourteen thousand dollars annually from the business (1 R. 81–82).

In fact, Mrs. Tenenbaum had no proprietary interest in the store, nor was she or her sister a salaried employee (1 R. 105). Mrs. Tenenbaum had lent her son money for the operation of the business (1 R. 99, 105), and both she and Mrs. Schafer occasionally provided free assistance during special sales (1 R. 98). Nor was Mrs. Schafer employed by the jeweler, as she had represented (1 R. 83–95).

The substantive charges against petitioner Paul Schafer were based on misrepresentations he had made in applying for, and making claims upon, similar insurance policies which he had obtained from various insurance firms.[1] Schafer testified in his own behalf and asserted that his statements, which were false in that they represented that he was presently employed by firms with which his employment relations had been severed, were made on the instructions of the insurance agent (1 R. 116, 118). Schafer also made numerous claims on his policies (1 R. 117–119), and was paid more than $7,500 on these claims (GX 24, 26, 79, 80, 81, 85, 86, 87, 88, 89, 90, 96, 97).

2. Following the jury's verdict, petitioners' attorney applied for probation on behalf of all. The dis-

[1] Paul Schafer's policies were with Metropolitan Life Insurance Co. (1 R. 34, 116), with Mutual of Omaha ($300 per month) (1 R. 70), and with United Benefit Life Insurance Co. of Omaha (1 R. 115).

trict judge stated that he assumed that none of the petitioners had a prior criminal record and that he thought it unnecessary to have a presentence investigation (2 R. 9). An extensive colloquy ensued, in which all petitioners and their attorney participated (2 R. 10–23). After listening to what petitioners had to say, the judge imposed sentence.

ARGUMENT

Neither of the two contentions made here by petitioners warrants consideration by this Court. Both were correctly rejected in the court of appeals.

1. The claim that the evidence in this case did not support the indictment's charge of a *single* conspiracy is without merit. Petitioners apparently concede that the Tenenbaums acted together and that the Schafers acted jointly; they contend only that there is no evidence in the record of any express or implied agreement between Mrs. Schafer and Mrs. Tenenbaum. This argument overlooks the fact that Mrs. Schafer knew of Mrs. Tenenbaum's first policy at the time of her meetings with the agent of Mutual of Omaha; that Mrs. Schafer arranged to have the agent meet with Mrs. Tenenbaum with regard to such a policy; and that Mrs. Schafer accompanied Mrs. Tenenbaum on one occasion when she visited an insurance agent to inquire about the availability of an income protection policy (1 R. 58). These incidents, when taken together with the family relationships among petitioners, the similarity of their acts, and the circumstance that both Mrs. Tenenbaum and Mrs. Schafer claimed to be employed at Marvin Tenenbaum's chil-

dren's apparel shop, certainly sustained the inference that the acts of all petitioners "were tied together as stages in the formation of a larger all-inclusive combination," or were all drawn "together in a single, over-all, comprehensive plan." *Blumenthal* v. *United States*, 332 U.S. 539, 558. The jury could reasonably infer the existence of "a common purpose and plan * * * from a 'development and a collocation of circumstances'" (*Glasser* v. *United States*, 315 U.S. 60, 80) such as that shown in the present record. See *e.g.*, *United States* v. *Crosby*, 294 F. 2d 928, 944–945 (C.A. 2), certiorari denied, 368 U.S. 984; *Kaufman* v. *United States*, 163 F. 2d 404, 411 (C.A. 6), certiorari denied, 333 U.S. 857; *Baker* v. *United States*, 156 F. 2d 386 (C.A. 5), certiorari denied, 329 U.S. 763.

2. Nor is there any substance to the contention that the trial judge was obliged to order a presentence investigation under Rule 32(c) of the Federal Rules of Criminal Procedure. Rule 32(c) is not mandatory on the district court; it leaves to the court's discretion the decision whether or not to order a presentence investigation and report. *United States* v. *Karavias*, 170 F. 2d 968 (C.A. 7); *United States* v. *Schwenke*, 221 F. 2d 356 (C.A. 2); *United States* v. *Williams*, 254 F. 2d 253, 254 (C.A. 3); *Roddy* v. *United States*, 296 F. 2d 9 (C.A. 10). After allowing petitioners and their counsel to bring all matters to his attention which might bear on the sentences, the district judge in this case imposed moderate prison terms which carefully distinguished among petitioners. The court assumed that none of the petitioners had a prior

criminal record, and the sentences were imposed on the basis of each petitioner's participation in the offense and the judge's observation of the petitioners in the course of the nine-day trial. Under these circumstances, the court was manifestly acting well within its allowable discretion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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